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2016

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Bartleby's Consensual Dysphoria

Draft

Robin West

The 2011 Occupy Wall Street protest movement, that for several months five years ago captured the political imagination and discontents of a healthy slice of the millennial generation, adopted what on first blush appears to be a peculiar literary mascot: Bartleby the scrivener, one of the two protagonists of the *Story of Wall Street* penned by Herman Melville in the middle of the nineteenth century.¹ Melville's dysfunctional scrivener was prominently displayed on the OWS protesters' posters, his story was given several readings during evenings in the parks, and his very being – meaning both his passive resistance to his employer's various requests and his sheer and undeniably animalistic physicality – was widely hailed by the organizers and occupiers of the 2011 movement as the “original wall street occupier.”² Melville's Bartleby, after all, was an uncooperative employee who first engaged in a work stoppage and then literally occupied the offices of the Wall Street lawyer who had hired him, then fired him, and who had then attempted – unsuccessfully – to evict him. The OWS protesters found common cause.

The appropriation by this twenty first century left-wing protest movement of a protagonist from a canonical mid-nineteenth century novella didn't just come out of the blue. As I will discuss in some detail in the first section below, Melville's *Story of Wall Street* has for several decades now been a staple of analysis by Marxist, neo-Marxist, structuralist, post-structuralist, and socio-critical academic literary critics, all of whom, like the OWS'ers, connect Bartleby's plight to class-based sympathies, labor politics, or protest. Nevertheless, and despite both the academic left-wing interest in Bartleby and the formal convergences of location and status, this empathic identity of interests between those twenty-first century street protesters pushing back against the dominance of the .01% – the Wall Street financiers, stocks and debt speculators, and the money marketers – on the one hand, and a pathetic, melancholic, cadaverous, anorexic, apparently suicidal, and fictional mid-nineteenth century legal scrivener on the other, is decidedly odd. Recall, first, Bartleby's narrative trajectory, which doesn't, or shouldn't, inspire confidence for the OWS'ers: a few weeks into his employment as a scrivener in the narrator's Wall Street law office, Bartleby announces, in a response to his employer's eminently reasonable request, that he “would prefer not” to proofread the mortgage documents he had just copied.³ A few days later he makes clear that he would likewise prefer not to do any proofreading of any documents,⁴ and shortly thereafter that he would prefer not to do any copying either.⁵ He eventually states that he would prefer not to run errands,⁶ and finally that he would unequivocally prefer not to do any work at all.⁷ Then, for some unspecified period of time – certainly weeks, maybe months –

following this latest announcement he stands stationary in the office, doing nothing. His employer – the narrator – implores him to leave the premises, but Bartleby would prefer not to go, and as the narrator doesn't have the fortitude to forcibly evict him, Bartleby remains in the office, sleeping at night and standing stationary and silent during the day. Thus, his "occupation" of the Wall Street office. Our narrating lawyer can't figure out a way to either fire or evict Bartleby that would be consistent with the demands of conscience, so he eventually leaves the premises himself, renting an office elsewhere, leaving Bartleby standing alone in the deserted office space.⁸ A subsequent tenant with no such moral qualms has Bartleby taken by the constabulary to the Tombs, where he announces that he would prefer not to accept food and consequently dies from starvation.⁹

So, it is true, as his OSW celebrants have all suggested, that Bartleby did indeed engage in both a work stoppage and an occupation of a "Wall Street office" – so perhaps it is fair to describe him as the "First Wall Street Occupier." Nevertheless, Bartleby's an odd hero for this left wing populist movement. First, Bartleby is no Thoreauvian civilly-disobedient protester. He never articulates a demand of either his employer or the state, he never explains his position, he never even nods toward a different vision of work, or life, or sustenance, or community, or humanity. His "occupation" is successful – to the limited degree it succeeds – only because of the lawyer's pricks of conscience, and it fails when the lawyer's prudential concern for his own law practice supersedes fellow feeling. More fundamentally, Bartleby does not mount any resistance at all to, or evidence any dissatisfaction with, his employer's "snug business dealing with rich men's bonds and mortgages and title deeds" – that particular description of the work of the office Bartleby's occupying comes from the narrator himself, not Bartleby. Nor does Bartleby complain of his status or treatment as an employee. He is not striking for better wages or working conditions. As a number of commentators have observed, Bartleby doesn't even refuse to work in any unequivocal sense – he simply states, repeatedly, that he "would prefer not to" do the various tasks asked of him. And most notably, and most unlike the protesters who have adopted him as an icon, Bartleby is utterly, profoundly, will-less, and twice over, in the manner in which he declares his own recalcitrance: first he states that recalcitrance in terms of his *preferences*, rather than with any declarations of will or intention – "I would *prefer* not to," he says, rather than "I won't," or "hell no" or "take this job and shove it." And second, he uses the conditional, or more precisely the conditional modal case, "I *would* prefer not to" rather than the direct case "I prefer not to" even when putting forward his preferences. He's stating a descriptive truth about his hypothetical preferences – a far cry from an unequivocal refusal to do anything. So simply as a *protester*, Bartleby's pretty lame.

Nor does Bartleby make for a particularly compelling proletarian victim of capitalist excesses. First, he's an employee in a comfortable office working for a kind-enough-hearted employer, not a factory worker toiling in inhumane conditions unto an early death. Melville was by no means blind to the plight of such workers: simply contrast his horrific depiction of the ashen-faced Maids in a paper factory, in *The Paradise of Bachelors and the Tartarus of Maids*,¹⁰ written just a year after *Bartleby*, who do indeed work themselves to an early death manufacturing the

paper on which the lawyer-bachelors of Fleet Street ply their luxury-drenched trade. Bartleby's work conditions don't compare in the slightest to that of the maids' – and his employer's circumstances likewise don't come anywhere near the hedonistic excesses enjoyed by the lawyers in *The Paradise of Bachelors*. Indeed, Bartleby the scrivener is closer in economic class and even in the nature of his work to the lawyer who is his employer – Bartleby is copying those mortgages and bond documents, rather than writing them, but nevertheless both are putting loan agreements backed by either real property or business assets onto paper – than he is to the proletariat working to facilitate those capital processes, and who is so graphically depicted in *Tartarus*. But second, and more to the point, it simply isn't the case that Bartleby the scrivener's great burden in life is due to economic want. Bartleby is not forced to choose dreary or stultifying or inhumane employment over death; very much to the contrary. At various points in the story Bartleby is given a menu of pleasant-enough options by his increasingly desperate employer: he is offered other forms of work both in the office – he might run errands rather than do any copying at all – as well as outside of it – such as working as a bartender, his employer suggests, or even working “in the open air” as a traveling companion.¹¹ He is offered the option of living free of charge in his employer's home, and finally of simply accepting his charity.¹² Once removed to prison, he is offered food, prepared for him by a prison cook specifically tasked with his oversight, and all to be paid for by his ex-employer, but Bartleby would prefer not to accept that offer as well.¹³ Whatever it is, then, Bartleby's problem is not that he is coerced into accepting subordinating, humiliating or horrendous work because his only choice is death. He is not so coerced, for the simple enough reason that he is given plenty of choices and he seemingly prefers death – even over the choice of not working at all and living free of charge with his employer. The problem of the novel, though, is that neither the reader nor narrator has any clue as to *why*. Maybe he's doing this as a protest of the ways in which other workers are forced into employment by the coercive fear of death, much as a football player might refuse to play a game or a student or a prisoner might embark on a hunger strike to draw attention to the plight of his aggrieved fellow students or prisoners, even if the striker feels under no such coercion himself. But we don't have any reason to think that social solidarity any more than necessity is what motivates Bartleby. We don't have any evidence that he has any social motivations at all.

But the problem goes deeper. Bartleby is, as several commentators put the point, really, deeply, truly, inescapably, *odd*. He seems deranged, both to the reader and the lawyer-employer-narrator, who does indeed describe his other employees at various points as useful machines,¹⁴ but who describes Bartleby, even from the beginning, as ghostly, apparitional, pallid, forlorn, corpse-like, cadaverous, or sickly, on almost every page.¹⁵ And, Bartleby is unquestionably sick. His eyesight is failing him and he eats almost nothing.¹⁶ He stares at blank walls all day, day in and day out. He has biological needs, which he meets only minimally and inadequately, and needless to say never exercises, although his physical presence looms large in the story. Bartleby lacks vitality, or *animus*, as well as will. He has so little interiority that, as with anorexics, his exterior self is sickly translucent. *Perhaps* he is a political dissident of some sort, or an alienated laborer, but what he unquestionably is, is

mentally ill: a victim of his own inner demons of which both the reader and the narrator know nothing. It is of course possible to pity him – as the narrator does.¹⁷ That pity itself becomes problematic: the narrator has a coldly transactional understanding of pity's economic value to the pitier, as well as of the value of the charity to which it can lead.¹⁸ The reader should perhaps look skeptically at the pity Bartleby sparks, both in the narrator and in himself. But however we come to assess our own or the narrator's pity for Bartleby, it is much harder to understand how we might *empathize* with such a creature: how, that is, we might recognize ourselves in Bartleby's recalcitrance. But this is precisely what the OWSers did – or claimed to do. Bartleby the story was not just *of interest* to the OWSers. Rather, they seemingly recognized themselves in Bartleby the man; they claimed his aspirations and his humanity as their own, or they claimed their own aspirations and humanity as his. He was like them. They were like him. Bartleby was their fully human compatriot. Why? What did the OWSers recognize, like, or empathize with, in this notably odd character, whose protest, if that is what it was, so spectacularly failed, and who steadfastly refused to reveal anything about his motivations? Why did the protesters find Bartleby *sympatico*, and so *sympatico*, in fact, as to put his name on their posters, to claim him as their own, and to read the story Melville wrote about his fate, in the park?

In the bulk of this paper, I will ask and try to answer this question: what did the OWS protesters recognize in a non-pathologized Bartleby that sparked their empathic identification? More broadly, what is it, in Bartleby and in his recalcitrance that is recognizably and deeply human? Eventually, I will argue – drawing heavily on and then expanding upon an essay written several decades ago by Brook Thomas on the jurisprudential background of Melville's story¹⁹ – that Bartleby *the man* –not Bartleby the symbol, or Bartleby the distilled essence of negative potentiality, or Bartleby the vessel – can be understood to suffer from an extreme case of what I will call “consensual dysphoria,” a phrase I've made up, but by which I mean a disorienting and disabling consciousness of a radical disjuncture between one's *felt* subjective pleasures and pains, and the transactions and states of the world to which one gives one's free or voluntary consent. Consensual dysphoria, as I will describe it, is an affliction felt by *individuals* – and thus sensibly subject to narrative treatment – but it is *not* a psychological malady that afflicts subjects because of the machinations of intimate, familial, or private life. It is, rather, a *political* malady – an affliction – felt by individuals in liberal states, and brought on by the powers of political rhetoric and influence. My claim will be that consensual dysphoria has been an acutely felt part of the consciousness of *both* the classical legal thought of the mid-nineteenth century and the liberal legalist thought of our own time period. Melville's Bartleby had that condition *in extremis*, and the 21st century protesters suffer from it as well. They recognized that fact, and identified with Bartleby because of it. That commonality, I want to suggest, lays the groundwork for the otherwise pretty inexplicable empathic bond between them.

The first part below discusses in very summary fashion some of the scholarly literature on Bartleby, with an eye toward elucidating why it is that so few scholars have felt the need to understand Bartleby's political malady – or more generally, to understand his humanity. The second part briefly discusses the jurisprudential

background and content of the story, expanding where need be on Thomas's similarly motivated account from the 1980s. The third and fourth parts introduce the idea of "consensual dysphoria" as an individualized, psychic manifestation of some of the discomforts attendant to liberal and neoliberal markets and state organization, and makes the case that this is the essence of *Bartleby's* affliction. I conclude with some observations about the OWS movement informed by some aspects of this analysis.

A. *Ah, Bartleby! Ah, Humanity?*

So, what afflicts Bartleby? What are we to make of Bartleby *the man*, rather than Bartleby the Scrivener? Recent scholarship – and particularly Marxist accounts from the last quarter of the last century, and then neo-marxist and post-structuralist accounts from the first two decades of this one, all of which I will sometimes call, collectively, the "protest scholarship" – on Bartleby largely sidesteps the question. For virtually *all* of the participants in the protest scholarship, Bartleby the man, or even just Bartleby the character, is marginalized. There's just no need to understand him, apparently, and for some at least, it's really better that we don't; it's part of the point of the story, in fact, that we not. This alone is striking. The last utterance of the narrator, and the last sentence of the story, recall, is: "Ah Bartleby! Ah humanity!"²⁰ Yet his professional readers, and *particularly* the protest literature, bleach Bartleby of humanity.

Let me give just a few examples. First, in a seminal piece from 1974, Louise Barnett read Melville's *Bartleby* as an allegory dramatizing either the commodification of nature into property and then into securities and eventually into profit – the lawyer's "snug business," after all, was managing "rich men's bonds and mortgages and title deeds" – or the alienation of labor, either in the office itself, or in the factories and railroads those offices serviced, or both.²¹ Barnett's (and others') Marxist interpretation of *Bartleby* was more than well taken, whatever Melville's familiarity with Marx: the novella is unquestionably replete with images suggestively signifying the deadening effects of both commodification and alienation, on nature and laborers respectively, from the outside walls that face the lawyer's office's windows on all sides – the literal walls of Wall Street – and that Bartleby stares at for hours at a time and that encase the office in a coffin, to the arc of the lawyer's work: reducing nature, through the processes of law, to "property," and then reducing that property to collateral for loans, and then the loans themselves to profit, all of which is facilitated by, first, the lawyer's expertise in recording those agreements on paper, and then the copying and re-copying labor of scriveners – who are referred to by their employer as machines – and whose jobs of course are eventually themselves overtaken by machines, although after the time period of the story itself. All of this is more than ripe for Marxist interpretation. Nevertheless, it's fair to say that Bartleby himself, on Barnett's account, is not so much a character as he is a symbol: Bartleby is a representative of an alienated and largely *off-stage* workforce.²² His malady, his motives, his character, and his

emotions don't enter the analysis. They don't matter. Bartleby himself lacks humanity. The story, in Barnett's reading, is a story of and about *Wall Street*. Bartleby facilitates the unraveling of an argument. He's not truly a character, even, much less a recognizably human one.

The second strand of protest literature is jurisprudential, and plays a larger role in my own analysis; I will largely endorse and expand on it below. Here, my point is narrower, and parallels the above: the jurisprudential and Horwitzian reading that Brook Thomas provided of Melville's *Story of Wall Street* in 1987,²³ like Barnett's Marxist reading from two decades earlier, criticized Marxist readings along the lines suggested above, but then it similarly sidelined Bartleby himself. Thomas read *Bartleby the Scrivener* as dramatizing not simply an alienated, commodified, or injured workforce (as had Barnett), but more precisely, the legitimating mid-nineteenth century legal *mindset* – what is today called (following Morton Horwitz's lead) “classical legal thought” – that became dominant during that time period, and that facilitated all of that commodification and alienation, in part, by dulling both the class consciousness of the subordinated, and the conscience of elites, both legal and otherwise.²⁴ Classical legal thought of mid-nineteenth century America, Thomas argued, following Horwitz, conveyed a rhetoric that instilled, among much else, a comfort among legal actors with a legal world stripped of equitable and republican constraints on the rise of the powers of contract, and hence of any constraints which compassion might have otherwise placed on the various operations of capital. Again, Thomas's reading of *Bartleby* as a critical commentary on Classical Legal Thought is largely convincing, I think, and I will endorse it (with substantial expansion and modification) below. The story is indeed, as Thomas argues, mostly about and told through the eyes of the narrating *lawyer*, who in turn experiences – both in the changing nature of his work and in the changing contours of his conscience – the monumental shift rippling through the very fields of law in those mid-century decades in which he practiced: a shift away from equity to legalism, from status-defined and defining relations to contract, and most broadly, from a republican and paternalistic conception of the community, to a highly individualistic one, shorn of confining roles but also shorn of obligations of care of the strong for the weak.²⁵ Here, I just want to note that Bartleby *himself*, on Thomas's reading, is basically an afterthought. The story is just not about him. Rather, “classical legal thought,” or “formalism,” on this view, is the story's real target and, Melville, Thomas argues, whether or not he had a name for it, basically nailed it. The story is about the ways in which Classical Legal Thought molded, formed, and deformed a mid-nineteenth century lawyer's conscience. So, on Thomas's view, no less than on Bartlett's, Bartleby himself hardly enters into the analysis; the story is not about Bartleby, or even the narrator's relation to Bartleby, rather, it is about the lawyer's relationship to *law*, or, perhaps, to legal ideology. Consistent with Thomas's reading, the narrator's last utterance – *Ah Bartleby! Ah humanity!* – is a cry for the loss of the lawyer's humanity, effectuated jurisprudentially. It is not so much about the loss of his scrivener's.

Third: through the aughts and teens of this century, Melville's *Bartleby* has been taken up in a major way by prominent critical social philosophers as being in some sense emblematic of the limits, potentialities, and necessity of class-based

political protest in the context of a totalizing liberal statism. Thus, Bartleby's recalcitrance on the job – and particularly the “formulaic” way in which he expresses his conditional preference not to do it – is treated as a symbol of the negative potentiality of absolute resistance to an omnipresent sovereignty in Agamben's *Homo Sacer* – Bartleby's conditional preference not to work, Agamben argues, “offers the strongest objection to the principle of sovereignty.”²⁶ More expansively, Agamben treats Bartleby as a symbol of potentiality itself in the culminating essay in his book *Potentialities*, which is entirely devoted to a reading of Melville's *Bartleby*.²⁷ Bartleby is similarly invoked as emblematic of an absolute negative opposition to the state in Hardt and Negri's *The Empire*,²⁸ and as a symbol of the politics of “protestation,” rather than of “resistance,” for Žižek, opening a “politics which opens up a new space outside the hegemonic position *and* its negation.”²⁹ Pushing back against all of these poststructuralist readers, Professor Jonathan Poore has argued recently that Melville's *Bartleby* in no way constitutes either a Thoreauvian or an Agambenian protest against the *state*, and that it is a mistake to read it as such.³⁰ Rather, Poore argues, *Bartleby* should be read as a protest against not states at all but *markets* and the liberal economies that accommodate them: Bartleby's refusals are not refusals to participate as a subject in a sovereign state, but rather, they are refusals to participate in the market-based machinations of the capitalization of body and soul. Bartleby's complacent willingness to be imprisoned, furthermore, far from representing a *protest* against the state, for Poore, nods instead in the direction of the need for an activist state against market-based, private sphere, ideological hegemony, and the private oppressions to which those markets lead.

But for Poore, no less than for Agamben, Žižek, Hardt, and Negri, and as was true in different ways for Thomas and Barnett, Bartleby is not a *character* in any ordinary sense – meaning one we can make sense of, so to speak, empathically. For *all* of the twenty first century protest readers, no less than for Bartlett and Thomas in the twentieth, Bartleby is a symbol, not a man: he is a symbol, basically, of protest against oppression, whether the protest be against markets, capitalism, employment, classical legal thought, liberal individualism, or the state. The protest readers *do* embrace – and for radically different and also contradictory reasons, it should be noted – Bartleby's conditional preference “not to” – viewing it, alternately, as the “strongest possible protest against sovereignty,” (Agamben, from *Homo Sacer*) or as emblematic of potentiality itself and therefore as an echo of obliterated pasts (Agamben, *Potentialities*), as symbolizing a politics of “protestation” rather than “obstruction,” (Hardt and Negri) or as the embodiment of a negativity so absolute and so absent of content that its value as protest lies solely in its capacity to clear the path for humanistic societal reconstruction” (Žižek). But embracing Bartleby's near-disembodied conditional preference “not to” – his “formula of refusal,” as it has come to be called – as a symbol of an idealized even if doomed form of protest against sovereignty – and whether of potentiality, of protestation, or of negativity – is a far cry from embracing Bartleby the man, or for that matter, from reckoning him.

Again note the continuity with earlier readings. For all of the protest readers, from Bartlett to Poore, the very *lack* of development of Bartleby's character – the

absence of his humanity, in fact – facilitates the reading. There are other similarities across all of these readings in the protest literature, from the sixties to the present: they all focus, albeit for different reasons, on Melville's metaphorical illusions in this *Story of Wall Street* to the *office* as a place that embodies or presages death and coffins, to the narrator's multiple illusions to laborers as machines, and of course to the multiple reminders that the lawyer's work involves reducing land and labor to profit.³¹ And, all of these professional readers have been drawn to Bartleby's recalcitrance, and all see in that recalcitrance much that illuminates the predicament of actors in contemporary liberal and capitalist states. But what the academic protest readers *don't* do is confront or discuss Bartleby as a fully formed, flesh and blood, sickly man who makes some decisions, acts on them, and dies because of them, for reasons we might discern. Rather, Bartleby exists for virtually all of these commentators as an abstraction: Bartleby is a vessel of pure potentiality,³² or he is a representative of some off-stage oppressed class,³³ or he is simply a plot device who serves to illuminate the evolution of the lawyer's own conscience and consciousness.³⁴ This is, itself, peculiar and noteworthy. Again, remember that this *Story of Wall Street* closes with the narrating lawyer's lament: "Ah Bartleby! Ah humanity!" What Bartleby never is, though, in the eyes of his scores of politically sympathetic academic readers, is a member of humanity, sharing much of anything with those who interpret him.

In contrast to the massive protest literature on Bartleby, there is a much smaller second group of professional readers – call them the psychological readers – and perhaps many casual readers as well – who *do* embrace Bartleby's humanity, or at least, they embrace, and countenance, his *sickness*. For these readers, if the story has any political meaning, it's a plea for greater funding for services for the profoundly mentally ill. *Bartleby the Scrivener*, in their hands, is not a story about capitalism or employment or commodification of labor or the alienation of the writing class or for that matter Wall Street, at all. Rather, it's a story about an anorexic, melancholic, oppositional and thoroughly unsympathetic employee. The psychological readers are in the distinct minority, but they *do* focus directly on Bartleby the man, and specifically on Bartleby's oddities, for which they then provide a range of diagnoses – Bartleby is, depending on the reader, depressive, melancholic, possibly schizophrenic, borderline or bipolar.³⁵ For the Freudians, he is a projection of the lawyer's id,³⁶ while for others, more biographically inclined, he is (and quite plausibly) a projection of Melville's own deeply ambivalent relation to his own career as a writer.³⁷ The psychological readers, unlike the political, do clearly recognize Bartleby's humanity, albeit primarily to pathologize and then diagnose him. The psychological readers, though, also have a problem, at least as acute as the protest readers: just as the protest readers can't account for (and don't try to account for) Bartleby as a man (and hence, aren't much interested in the psychological or psychic dimensions of Bartleby's malady), so the psychological readers can't account for (and don't much try to account for) the story's equally undeniable *politics*. Bartleby isn't just any old schizophrenic or melancholic or manic-depressive who wanders in off the street into just any old office. This story is after all set on *Wall Street*, and more particularly in a *Law Office* on Wall Street; there are multiple references to the substantive law that constitutes the lawyer's

work, just as there is an undeniable focus on the nature of the employment relation between the lawyer and his scriveners. None of this – the location on Wall Street, the nature of the lawyer’s work, the focus on the employment relationship itself – contributes in the slightest to an understanding of bipolarity or depression or schizophrenia or the lawyer’s or Melville’s id. Most important, though, and as Brook Thomas argued some time ago, it is the *lawyer’s* consciousness, and particularly the lawyer’s ruminations regarding the various relations between work, charity, contract, and what might be called the ethics of economic life, that dominates the story. Whatever then may be true of Bartleby the character, and whatever the nature of his sickness, *Bartleby the Scrivener* is indeed in some sense a “Story of Wall Street,” as its title proclaims, and as the political protest readers all in various ways recognize or assume.

Against this backdrop, the OWS’ers embrace of Bartleby as “the original wall street occupier” is strikingly distinctive: it stands in some contrast to *all* of these professional readers. Unlike the professional psychological readers, the OWSers seemingly embraced an un-pathologized Bartleby *the man*: not Bartleby the psychiatric case or Bartleby the schizophrenic, or Bartleby the projection, or Bartleby the dream. But, unlike the protest readers, they also embraced a humanized Bartleby: not Bartleby the political symbol, or Bartleby the class representative, or Bartleby the proletariat, or Bartleby the enigma, or Bartleby the ghost, or Bartleby the Christ figure, or Bartleby the messiah, or Bartleby the vessel of negative potentiality, or Bartleby the plot device. They saw Bartleby, in short, neither as fundamentally sick, nor as fundamentally symbolic. They saw in Bartleby a compatriot: a flesh and blood fellow traveler who engaged in a work stoppage, occupied an office, and ended his life in a hunger strike. The OWSer’s, in other words, didn’t just reckon Bartleby’s significance. They recognized *him*. They empathized with him. In fact, they identified with him. They shared in his humanity, and he in theirs. So, again, why? Where’s the commonality?

B. Bartleby and Classical Legal Thought

The key, I believe, lies in the jurisprudence. As Brook Thomas rightly noted in his essay from a couple decades back, Melville’s *Story of Wall Street* is indeed set – and was written – at the apex of the jurisprudential era legal historians now refer to as “Classical Legal Thought.”³⁸ The basic contours of the jurisprudential shift thereby inaugurated – what Morton Horwitz called “formalism” in his seminal historical treatment of the era *The Transformation of American Law*³⁹ – is described, largely implicitly but also at times explicitly, in Melville’s story, and with almost eerie pitch perfection, as Thomas’s essay shows. Virtually *all* of the major legal developments Horwitz chronicled in his important history of the era are central to either the law itself, practiced in Bartleby’s employer’s office, to his employer’s consciousness, which is on constant display throughout the narrative, or to the background conditions within which the narrator tries to cope with his enigmatic scrivener: the rise of contract, the demise of both status-based legal relations and republicanism, the diminution of tort as a regulator of employment relations, the reduction of any paternalistic role of the state for the wellbeing of the economically

weak, and the convergence of interest of the entrepreneurial class, capitalists, industrialists, and the judiciary. All of these were part of the changing contours of American private law in the middle of the nineteenth century, and Melville's *Story of Wall Street* is set against them. Thomas well captured most of that era's transformation's manifestations in Melville's account of the life of lawyers and their scrivener staffs, in his essay. But he missed a few. And, because he missed a few, he missed one big one: the consensual dysphoria that may be the era's most disabling legacy. I'll take up these points in that order.

So first, the transformation in American law, as described by Horwitz, dramatized by Melville, and as accurately but only partially summarized by Thomas. The first such manifestation of that transformation that hits you, although Thomas doesn't dwell on it, is the narrator's self-interested disgust, introduced in the first pages of the story, with the disappearance of the Equity Courts in New York, effectuated by the adoption of the Field Code.⁴⁰ That "merger," as it came to be called, of "law" and "equity" eventually caused the narrator to lose his position – and additional income – that had been accorded him as a "Chancery Judge" – a distinctive quasi judicial position, which at the time was by custom given to a member of the Bar and hence a practicing lawyer, and who would hear cases that arose in "equity" rather than law. As all first year law students are taught, the "merger of law and equity" which Melville's lawyer lamented, brought about by that constitutional change in New York law and eventually in all states' procedural law, ushered in the end of equity itself – an alternative system of principles, in some form available from antiquity, to the sometimes unjustly harsh rigors of rules of the common law, including the unjustly harsh rigors of contract law.⁴¹ A part of that alternative equity regime included principles that softened the possible harshness of contract law itself – what later came to be called the "unconscionability" doctrine, and which in a tortured history has nearly disappeared – and in part as a consequence of the merger of law and equity that Bartleby's employer lamented.⁴² Second, and as Thomas argues in detail, was the shifting legal doctrine of charity, brought on in no small part through the opinions of Melville's father in law, Chief Justice Lemuel Shaw, and which had the effect of privatizing all aid to the poor and thus underscoring the law's relative disinterest in providing the same.⁴³ Although the changing law is nowhere mentioned in Bartleby, nevertheless, the narrator reflects on his own charitable impulses,⁴⁴ the existence of private charity as the only possible source of sustenance for his dysfunctional scrivener, and the tasty "morsel of conscience" that can be gained by indulging one's beneficent inclinations,⁴⁵ both as a guard against the danger to self and others of indulging one's own criminal instincts,⁴⁶ and as a way to balance the books of civic duty and commercial gain.⁴⁷ The felt and perpetual conflict between the narrator's inclination to act charitably toward Bartleby – to embrace him as a fellow son of Adam, as he puts it at one pivotal point⁴⁸ – and his professional inclination to employ him, use his services, fire him when those services are wanting, and then to evict him when he proves to be an embarrassment, basically frame the narrative's arc. All of this Thomas successfully stands in comparison to the contemporaneous Shavian decisions regarding the emergence of a near-totalizing privatization of the republican duties of the state to care for those who can't do so for themselves, through an expanded role of estate

law, and more specifically, through not just a greater deference to the will of testators but also to the demands of family members.⁴⁹ Family and individual beneficence, the law declared, not state or community patriarchs, would care for their own, henceforth. Third, Thomas sets Melville's story against the radical diminution of not just the role of *status* in setting responsibilities in legal relations, but also the diminishing role of *tort law*, as the century progressed, as a vehicle for holding corporate employers responsible for the injuries suffered by their employees. The latter transformation in particular marked the beginnings of an era of *laissez faire* in employment relations, and an end of a more republican as well as more status-based and communitarian account of the role of the state in structuring – and protecting – employees.⁵⁰

Now on the transformation Thomas didn't note, but which is fully supportive of his thesis. Of at least equal importance, although Thomas doesn't mention it, to both the classical legal thought of the era and to *Bartleby*, as the diminution of tort and the rise of private charity, is the expansion, clarification, and crystallization, as one commentator has put it, of the content of contract law itself – and of contract theory likewise. Basically, the narrator's relationship to Bartleby is completely exhausted by, first, the terms of his contract with him – an employment contract hastily entered, and then painfully ended – and then, eventually, by Bartleby's contractual "tenancy" in his office, also hastily entered and then painfully terminated. Bartleby's employment, of course, was "at will" – Bartleby had no *right* to his job, and no right to any particular terms, and likewise the employer had no obligation to employ Bartleby, to keep Bartleby employed, or to oversee his welfare. Their contractual relationship – both the existence and the continuation of that contract – depended entirely on their mutual consent. On this point the law was clear and in the process of becoming all the clearer: the common law of contract law was in the process, case by case, of shedding the burdens of rules of equity, which may have conditioned the terms of the contract with concerns of fairness,⁵¹ and of freeing contractors of any equitable obligation to contract with anyone other than partners who were freely chosen – thus the narrator was no obligation to contract with Bartleby or to keep Bartleby, or any of his other scriveners, in his employ any longer than would be useful to him. The narrator could terminate the relationship with any of his scriveners at any point, a power to which the narrator makes multiple references in the course of his story.⁵² The scriveners had no rights – either to the job, to its continuation, or to terms – that might have followed on the heels of their tenure in the office, the quality of their performance, or certainly on the basis of their need. The law that had in earlier times been one of "status" – the branch of the law determining the relation of master and servant – became "employment law," and employment law became "contract law": thus masters and servants became employers and employees, who in turn became freely contracting parties, such that their relations became determined entirely by terms freely chosen between them, rather than by anything imposed by law. The same could be said of the law of tenancy: landlord and tenant became freely contracting parties, whose relationship and the duties it entailed were a function of their contract, not their status.

Contract law, in other words, during this time period, became “crystalline” in its contours: obligations were starkly conditioned on mutual consent, rather than on consent as modified by, or muddled up by, either law or status. Contract *theory* was likewise moving in the same direction: the very basis of contractual obligation, according to the evolving and somewhat mutating “doctrine of consideration” of the time, was a promised exchange of values that would prove mutually beneficial, not any expectation or any reliance created in another by virtue of promises, and not the prospect of an injury that might be sustained by virtue of a promise broken.⁵³ Thus, the narrator, according to the theory of contract then emerging, need maintain Bartleby’s employment – as well as that of his other scriveners – only to the degree it was and remained profitable to him to do so, a limit on his obligations of which he was well aware – not any reliance that might have been induced in his scriveners by virtue of their status. Bartleby’s “tenancy” likewise was subject to the narrator’s will. The narrator knew that he could charge Bartleby with trespass and have him physically removed, and in a bout of catastrophic thinking he worries that if he *doesn’t* do so – if he impliedly consents to Bartleby’s occupation of his office – Bartleby may well outlive him and inherit the office through adverse possession – the scenario that prompted the narrator in a panic to remove himself from the office, as he can’t bring himself to have Bartleby evicted.⁵⁴ Both of these contractual relations – the employment relation and then the relation of tenancy -- dominate the narrator’s consciousness, and both compete in his ruminations with the dictates of conscience: the law of contract and property give the employer the right and the power to rid himself of his noxious scrivener, while the demands of conscience and fellow feeling – both self interested and not – push the narrator, through the course of the story, to first maintain Bartleby’s employment in spite of the loss of Bartleby’s services, and therefore of his value, then allow his tenancy in spite of the absence of any contribution Bartleby is making that would justify that tenancy, to ultimately offer him his charity, in spite of the lack of any self interested reason to do so, and finally, in the story’s last sentence, to despair of the loss of Bartleby’s humanity.

All of the legal transformations that in turn constituted the legal framework within which the lawyer works and which dictated his relationship with his scrivener – changes in tort law that limited the responsibility of industrial era employers for injuries suffered by employees at work, and changes in contract law that expanded the reach of contract, including contractual powers to limit tort and status based liability – were ushered in, in part, through the judicial branch, including through the labors of Judge Lemuel Shaw, Melville’s father-in-law.⁵⁵ All are either alluded to or detailed in *Bartleby*. And, of most important to Thomas, and I think correctly so, all of these changes in jurisprudence take their legitimating toll on the lawyer-employer-narrator’s conscience: before the whole structure crumbles, the legal structures of tort, of contract, of charity, and of status, collectively, justify, in the lawyer’s mind, his tendency to commodify his own humanitarian instincts, his contract- rather than tort- or status-based sense of his duties toward his employees, as well as his attitude toward his own work, managing rich men’s bonds and titles, and of course managing his own law practice, which is itself as much a product of contract and property law, as is Bartleby’s work itself.

C. Preference, Consent, Value, and Classical Legal Thought – in Bartleby

The rise of contract, along with the diminution of tort, the disappearance of status, and the demise of republicanism, as the basis of social organization, all had one further implication, however, also vividly reflected in Melville's story, and which Thomas, as well as all of the other protest writers, taken collectively, have seemingly missed. The transformation of the legal system toward contract (and the changes within contract law as well toward a theory of consent rather than of relationality as the basis of contractual obligation) partly rested on, and partly generated, a transformation in the way utilitarian-inclined lawyers and jurists collectively defined, and regarded, *value*, or more generally, the good, and hence the common good, and particularly the value, both as accrued by individuals and as accrued by communities, which we hope to gain by virtue of law itself. Value might of course be understood in any number of ways, but two possible ways of doing so had some sort of contemporary traction or pedigree among lawyers, legal scholars, and judges, by the middle of the nineteenth century: we might understand value, as did Benthamite utilitarians, by reference to the quantum of pleasure over pain effectuated by some change in the world, including by law,⁵⁶ or we might understand value, as did Millian utilitarians, roughly, by reference to an ideal of happiness – happiness as experienced by a well raised and educated hypothetical human subject.⁵⁷ According to the first understanding, which I'll call hedonic utilitarianism, a change in the world, whether effectuated by law or any other act of power, creates *value* if it creates more pleasure than pain. According to the second, which we can call ideal utilitarianism, a change in the world creates value if it creates more happiness, understood not by reference to felt pleasure and pain, but rather by reference to some sort of idealized conception of happiness or flourishing experienced by well educated and mature and moral persons, even if those persons are hypothetical. *Law* can be evaluated accordingly: a law, or a contract, or a legal decision, like any other act of power, is a good decision, or act, if it leads to more pleasure than pain as felt by all affected parties, under the first hedonic utilitarian theory, and if it leads to a greater quantum of happiness understood ideally, under the second, ideal or Millian account.

Both of these early and mid nineteenth century emergent understandings of utilitarianism, and hence of value, were more or less displaced by the economization of the concept of value in economic and political theory – a transformation in the concept of value that came on the heels of, but also somewhat concurrently with, the rise of contract over tort and status in law, as historicized by Horwitz, as dramatized, somewhat, by Melville, and as felt and lived by Melville's lawyer on Wall Street. Rather than *either* subjective pleasure and pain, as was true on hedonic or benthamite conceptions of value, or objective conceptions of happiness, as per Mill, as the marker of value, according to pivotal economic and political theorists of the late nineteenth and early twentieth century, we should look instead to the fulfillment, or satisfaction, of felt individual *preferences* – and hence the creation of wealth – as that satiation is manifested in consensual transactions registered in free markets. Value, then, on a “wealth maximizing” account, is by definition created by the satisfaction of felt preferences, as manifested, paradigmatically in acts of

consent, as registered in free market choices, and not in increases in pleasure or diminutions of pain, or in idealized incremental improvement in the happiness or flourishing of hypothetical human actors.⁵⁸ The reasons for the shift away from both pleasure or happiness to satiated preference as a means of measuring value varied, depending on the theorist, but in retrospect two major reasons, or arguments, for making the shift dominated: First, the satisfaction of preferences as registered in consensual choices, unlike subjective pleasure or pain, and unlike happiness or flourishing, can be *measured*, or tallied, thus lending itself to greater certainty, and thus providing a more workable metric for decision-makers.⁵⁹ Second, the use of satisfied preference, rather than subjective pleasure or objective happiness, avoids supposed epistemic problems with both pleasure and pain and happiness – the measure of satisfied preferences, manifested in acts of consent, does not require the actor to compare subjective pleasures and pains across persons, as is required by hedonistic utilitarianism, or a choice between competing and perhaps irreconcilable objective conceptions of happiness, as required by ideal utilitarianism.⁶⁰ Whatever the reasons for it, though, the transformation within utilitarianism of these conceptions of the good – away from subjective pleasure or objective happiness as that which should guide decision-making – to the much more behavioral conception of a revealed preference between choices, was hugely consequential. As is widely understood, it gave rise to a normative economic and quasi-“scientific” account of the goodness of law, largely displacing classical utilitarian approaches. But second, the entrenchment of that normative economic account in turn gave rise to what can fairly be called an “ethic of consent.” According to that ethic of consent, consensual acts and particularly bargains on open markets without third party affects are paradigmatically good: such bargains are by definition good, so long as there are no third party effects, because they definitionally satisfy manifested preferences, and hence create value, and hence wealth.⁶¹

The implications for *law*, and the way we evaluate and criticize it, of this transformation in concepts of value – the difference between, on the one hand, either a tabulation of felt pleasures and pains, or objective measures of happiness, as the felt measure of value, and on the other, the satisfaction of preferences as the way we go about doing so – are multiple, but that difference is felt most profoundly, or at any rate most transparently, in contract law and theory. If value is created through the satisfaction of preferences which are in turn registered by acts of consent, then the consensual exchange that is the essence of contract, and of contract law, becomes *paradigmatically* good – it creates value *by definition*.⁶² By contrast, this is just *not true*, if value is understood as tied to either hedonic pleasure or idealized happiness: a consensual exchange *may* increase value on either hedonic or idealized utilitarian accounts of value, if each contractor well understands his own utility and is motivated to maximize it, but this is by no means necessarily the case: there may be all sorts of reasons that a satisfied preference may not well track either felt pleasure or objective happiness. *Contract law*, over the course of the century following the setting of both Melville’s story and the transformation Horwitz described, was dominated by classical legal thought, and during that period, it basically absorbed this economic understanding of value, and hence this account

of the goodness of the contracts it governs. One fairly well understood result of this transformation is an account of the definitional goodness of consensual contracts that in turn entails a robust – and in fact tautological – argument against paternalism: consensual contracts create value by definition, no matter how one-sided or apparently unwise.⁶³ A second fairly well understood result is that it prompts a turn toward individualism and against collectivism: individual consensual acts are the font of value, not anything done or experienced by collectives. A third is that it created, or prompted, an expansive conception of contract's reach: the commodification of everything and anything opens the possibility of its exchange, and therefore the creation of value.⁶⁴ Doctrinally, it prompted an understanding of the meaning of contract that in turn transformed its legal definition and contours, from a shift in the understanding of both the consideration doctrine and the rules of offer and acceptance that requisite to a contract's enforcement, to an understanding of the rationale and primacy of the expectation interest, to the rules governing recovery when a contract is breached. Lastly, and in sum, and as is also fairly well understood, it implied a powerful argument for the ethical primacy of *contract law* over both tort and administrative law as forms of social organization.⁶⁵ The latter, in various ways, blunt the force of contract and therefore frustrate the creation of value – at least to whatever degree that wealth and preference, rather than pleasure or happiness, are the lodestar of value.

Now, this transformation in our understanding of *value* – away from either subjective pleasure or idealized happiness, to instead the satiation of preference, as the key to the creation of value, no less than the transformation of American private law – no less than the transformation of *law*, is *also* cleanly reflected, or narrated, in *Bartleby*. This is the main point that I think is missing from Thomas's otherwise fairly exhaustive account. It's reflected in three ways, the first two of which I'll take up here, and the third, which I think is Melville's most profound contribution in this novella, in the next section below. So first, Melville's story quite neatly presages nearly a century's worth of criticism of that transformation – criticisms offered in various ways from legal realists in the early twentieth century, and by critical legal scholars, some liberal legalists, some identity scholars, and scores of moral and Marxist philosophers and neo-marxists from all disciplines in the second half of that century. One point of commonality across these criticisms is that the consent that marks value, according to the economic conception, serves to legitimate whatever structures of power, of politics, or simply of inequality that rendered the transaction to which consent is ultimately given so attractive in the first place. This "legitimation critique" of consensual ethics in justifying to the strong and the weak alike the various inequalities that constitute market economies, has loomed large over the last century of academic commentary and debate on the economization of the concept of value, and it *also* looms large in *Bartleby the Scrivener*: the narrator's understanding of his employees and the nature of the employment contract, his cavalier dismissal at least in the first two thirds of the book of their economic needs and the insufficiency of their incomes to meet those needs, his understanding of the value to him of his own charitable instincts, his regard for the work of equity and chancery as tied to the income he received from it, rather than the good it does, his

repeated invocation of the nature of employment-at-will, his understanding of the meaning and purpose of real property and trespass law, *all* reflect not only the machinations and the legitimating consequence of the transformation of contract law, but also the legitimating effect of the transformation of the concept of value that underlies it. It's worth noting that the shift from pleasure or happiness, to satisfied preference, as constituting the content of the good, is explicitly referenced by the narrator himself in a pivotal scene, in which he bemoans the oddity of the expression, both in the mouth of Bartleby, but also as a contagion. All of his employees, the narrator complains, as well as he himself, have taken to speaking about their preferences, rather than their intentions or desires. The narrator finds the shift to the language of preference bizarre, and disorienting.

Second, however, and I think of greater importance, both in the story and in the world, than the impact the transformation of value makes on the *narrator*, is the impact it has on *Bartleby* – and perhaps on the rest of us likewise. Bartleby, in effect, is living out the consequence of the economization of value. The most significant consequence of the transformation in our concept of value toward an economic measure focused on a behavior – the satiation of preference, as marked by consensual choices on open markets – may not be its contribution to machinations of legitimation, but rather, the contribution that transformation has made to the marginalization of the *relevance* of both subjective measures – such as pleasure and pain – or objective measures – such as happiness, or a good life – to our shared or individual conceptions of the good, and hence of the good life. Again, on this transformed conception, it is satisfaction of preferences, as reflected in consensual market choices, that creates value and that therefore defines the good, *not* subjective pleasures or pains or objective conceptions of happiness. Subjective sensations of pleasure or pain, as well as objective understandings of happiness, either don't exist, or can't be measured, or can't be understood – either way they just have *no use* in determining what we should and shouldn't *value*, according to economic and now dominant conceptions of value. Bartleby, as imagined by Herman Melville, almost perfectly lives out just that economized understanding. Bartleby *is* the sum total of his preferences, and his life is the sum total of those preferences, *satisfied*. Everything Bartleby would prefer not to do, he doesn't, in fact, do. He's perfectly satiated. And, just as important, is the flip side of this coin: Bartleby, more than any other character in American canonical literature, has no discernible hedonic life, *and* no objective interests, whether captured by a conception of happiness or not. His pleasures and pains and his happiness, understood ideally, have been marginalized. And – Bartleby, true to form, *has no* discernible pleasures or pains, and, he *has no* conception of the good life that he could pursue, even were he to have the access to it. Bartleby is nothing but his expressed, conditional, negative, and, most important, *satisfied* preferences: first, his expressed preference not to copy, not to proof read, not to run errands, not to work, not to leave his employer's office, not to take up any other offered employment, not to leave the banister of his ex-employer's ex-office, and not to accept either charity or food, and eventually his implied positive preference to do nothing, to live in the law office as long as possible, then to live out his life in the tombs, and then to starve himself to death. *None* of these preferences, either hypothetical or fulfilled,

translate into a knowable, communicable subjective hedonic life: his employer cannot discern Bartleby's inner life, but particularly cannot discern what pleases or pains him. *Nor* does Bartleby have any identifiable, knowable, conception of the good or of happiness that he is pursuing. He is nothing but his preferences, virtually all of which are satisfied: he does no copying, no proofreading and eventually no work, he remains in the office and then in prison as was his preference, without food as was likewise what he preferred, until he died, again by force of his own preference. He has plenty of preferences, all of which are satisfied. What Bartleby utterly lacks is precisely what is rendered marginal or non-existent by our transformation to an economized conception of value: any interior hedonic life or objective conception of the good. Bartleby, as a character, is *nothing but* the very behavior that has come to constitute our conception of value. And that conception kills him.

If we centralize *this* feature of Melville's story – Bartleby's character, decisions, and role in the story, rather than the narrator's conscience or consciousness, law itself, or the role of legitimation in the narrator's mindset – and we then feature *this* aspect of Bartleby's character – his enactment of the then rising and now dominant economic theory of value in the way we think about the good – *and if* we don't romanticize that enactment (as the protest readers all do, Agamben almost absurdly so) *or* pathologize it, then much of the mysteriousness of Bartleby, as a character, and of his reception, withers away. It is clear, first, why so many readers can't empathize with Bartleby – he reveals no hedonistic life with which to empathize and no conception of the good by which we can understand him. It's also clear why he is so existentially disturbing to his employer: in this quite central respect, the lawyer too much resembles him. Bartleby personifies the way in which the narrator himself understands the value of his employees, his own value to his clients, the value of his charitable and humane instincts, and the value of his work to the world – and it is a profoundly disturbing and, yes, inhumane picture. Likewise, it's clear why Bartleby's repeated use of the phrase "I would prefer" drives his employer to an irritated distraction: it presents a conception of a human being whose self understanding and whose value consists of a hypothetical inference that can be drawn about a superficial aspect of his life from a small slice of behavior, rather than from *any* deeper understanding of subjective life or *any* objective conception of the good. Bartleby's idiosyncrasies are also clarified. It's clear, for example, why Bartleby eats so little – he doesn't take anything *in*, because he has no interiority, no subjectivity, no mammalism or animalism, and hence no biologic inner being that consists of soft squishy matter sustained and nurtured by food – he is, again, the sum of his revealed preferences. He's behavior, not substance, particularly soft, squishy, internal substance. And it's clear why he has no interests, no family, no ambition, and no human connections – just as he has no interiority, he has no objectively defined or ascertainable conception of what it might mean to lead a good life. Thus, as is true of the economized conceptions of value that have now so dominated contract law, and increasingly law across the board, both subjective hedonism and objective interest have been displaced, in Bartleby and in how we understand him, by a tabulation of his satisfied preferences, as measures of what is good and right.

Mostly, though, it's clear why Bartleby's humanity is in fact so ambiguous: Bartleby has no *hedonic life*, and he has no *ideal life*. Both are essential to our humanity. Rather, what is *of value* to him, as well as the value he produces, according to this conception of value imposed upon him, is not tied to either his animality, or to his mammaliness, or to his own or any other conception of the good – what is of value is not tied to either his subjective hedonism nor to objective understandings of happiness. It is tied instead to the satisfaction of his preferences – both his positive and negative preferences – as they are registered on discernible markets. It is tied, in other words, to a small piece of *behavior* – a “revealed preference” – that is common to humans, corporations and computers all – common, that is, to any entity that can on the basis of an algorithm register a choice between proffered alternatives. There's just nothing distinctively or particularly human about any of that.

D. Bartleby's Consensual Dysphoria

Finally, a focus on Bartleby as a man, who enacts – who lives out – the economization of value, also might clarify the basis on which some might empathize with him, in spite of all of this: in spite, that is, of his peculiarity, and in spite of the inhumanity of the conception of value he enacts. Bartleby is not in fact a machine, or a ghost, or a cadaver, as the narrator is well aware. He does, after all, show flickers of an inner life at various points in the story: he expresses his exasperation and dismay – in fact, his *pain* – with his employer's obtuseness regarding his own failing eyesight,⁶⁶ he expresses contempt for his employer's presence in the jail,⁶⁷ and he expresses a positive desire for stability in his life.⁶⁸ He shows enough of his hedonic self, in fact, that his misery – his melancholy – comes through. And, also in common with the other humans who walk the planet, he does have a past: we know he worked in a dead letter office. We know also something of his conception of the good life: we know that he wishes to remain both relatively stationary – still – but also unconfined.⁶⁹ We know he experiences pain from his predicament, although we see little or none of it, and virtually no pleasure. How might *this* Bartleby – a Bartleby who experiences pleasure and pain but only fleetingly reveals it, and who may have a conception of the good although it mostly cannot be known to us, *experience* the conception of value he enacts? How does Bartleby experience the economized theory of value to which he so methodically and repetitively gives voice? How do any of the rest of us experience that conception of value?

This is not a question that gets much asked, even by critics of economized value. To review: *value*, on the economized view, is created paradigmatically through consensual exchanges, or bargains, that satisfy the preferences of the parties, including consensual exchanges of labor for pay. This view displaces two quite different conceptions of value: one, hedonistic, that identifies value with pleasure and pain, and the second, idealist, which identifies value, roughly, with the furtherance of objective interests or some objective account of the good. As the economic conception rises in prestige and then influence, particularly as ways to evaluate law and politics, both of these alternatives recede: there is, after all, no

necessary connection between the creation of value, so defined, on the one hand, and *either* pleasure and pain, or any conception of the good, on the other.

Now, the split between the economized conception of value that centers preferences, and the Millian (or Aristotlean, or Nussbaumian) conception of value mentioned above that center objective interests or accounts of the good (or of human flourishing), *has* been much criticized, by critics.⁷⁰ For any number of reasons, well catalogued by those critical accounts, individuals may consent to transactions which don't further their own interests, on virtually any defensible conception of the good life, and because of that disjuncture, there is a very real gap between the value created by economic measures and the furtherance of the good, as understood by philosophers, both for those who so consent and third parties. An individual may have internalized, for example, a stunted conception of his own potential, or a warped understanding of the choices facing him. Because of background, training, or upbringing, he or she may have a distorted sense of what will or won't be "in his interest." Even more clearly, his revealed preferences as between proffered choices are a function of the choices he is offered, and those may be negligible; even Aesop understood that the wolf may come to have a taste for sour grapes, simply because those are the grapes close to the ground and within reach.⁷¹ Or, the individual may have a false understanding of what leads to a good life because he has been trained for a life of obedience or submission. A wife may think that a life ruled solely by the demands of maternity, or the mandates of a patriarch, is the best to which she can aspire – and so on. There are any number of reasons our contractually revealed preferences may not further our objective interests. A contract law, and law generally, that doesn't incorporate in some fashion this pretty obvious truth will entrap its subjects in the preferences their current situation dictates, and will thus legitimate the possibly unjust hierarchical arrangements that in part generate those thwarted choices. Our choices, in other words, for any number of well recognized reasons, may not be in our own best interest, and when they are not, there is at least an argument for paternalistic or administrative intervention into markets, based on a shared conception of the good – the value of which must then be weighed against the liberty thereby sacrificed.

What has *not* been so criticized, though, or studied, are the consequences of the abandonment of *hedonistic* – or, loosely, Benthamic – accounts of value, and their displacement with preference-based conceptions. Presumably, just as we sometimes prefer that which is not in our objective interest, because of the influence of pernicious forces, likewise we sometimes prefer that which will not subjectively please us, or something which may subjectively pain us. Just as we may be mistaken about our interests so we may be mistaken about what will further minimize our pain or promote our pleasures. Or, we may harbor masochistic tendencies. Or, we may be inclined to prioritize the interests of others (such as masters or patriarchs) over our own pleasure and pain. Or, we may be inclined to react altruistically rather than selfishly and for that reason sacrifice our subjective hedonistic utility. Our revealed preferences may not reflect our own inner calculation of pleasure and pain. Pleasure and pain may not, in fact, be our "masters." Bentham might have just been wrong about that.

Of course, if we simply *define* pleasure as that which we maximize, and pain as that which we minimize, when we satisfy our preferences, then the problem disappears: there simply can be no disjunction, by definitional fiat, of the pleasures and pains felt by our hedonic self and our satiated preferences acted upon by our preferring self. But what happens if, in the face of this definitional circularity, we nevertheless *experience* our satisfied preferences, on the one hand, and our pleasure and pain as diverging? What if, contrary to that seductive definitional assumption, we actually *experience* ourselves as consenting to transactions in situations where those transactions do not please us hedonically and rather cause pain? How do we “process” that disparity, mentally, psychically, emotionally? How do we *live with* the fact that some of our choices, unquestionably consensual, unambiguously registered in our market choices, and that undoubtedly satiate our preferences without even a hint of false consciousness entering the picture, make us miserable? How do we process the disconnect between the self presupposed by the economization of value – one which is made subjectively more pleasant and less pained with every consensual trade and with every satiated preference – and the self we might experience, that is made miserable by the choices we make between miserable options? How do we reconcile our hedonic self, so marginalized, and our preferring or consensual self, so elevated by the economization of value?

One way, I suggest, that we might react to such a disjuncture may be with a dysphoric alienation from one’s hedonic self, which brings me round to my title, and back to *Bartleby*. The *hedonic self* – the self that reckons pleasure and pain, that registers desire, that feels the world as hot or cold or smooth or rough, that is pained or pleased or soothed or hurt by fire and wind and rain and children and parents and sex and work and love and fear – *that* self, simply recedes, in felt importance, presence, and vitality, even to oneself, as the consensual, choosing, and preferring self – rather than the experiencing hedonic self – takes center stage. One’s choices, particularly one’s market choices, reflect our satiated preferences, and because they do so, they definitionally create value. Presumably, they should track as well our conception of the good – they should further the interests of our ideal self – and presumably, they should also maximize our felt pleasures and minimize our pain – they should further the interests of our hedonic self. But what if they don’t? If they don’t further our interests, then we squelch the ideal self, and all our awareness of it, as critics of the economized conception of the self have long maintained: we quiet our ambitions, we settle for sour grapes, we limit our reach, we dull our own consciousness. What has not been so noticed, though, is what happens when they don’t track our hedonic selves. Might we likely just squelch that one as well? And if so, what does that mean? It might mean at least this much: it might mean that we dull our *capacity* for intense pleasure, because we have minimized its relevance to our own wellbeing. It might mean that we marginalize the importance of our own desires, because we no longer heed their guidance. It might mean that we minimize the significance and meaning of our own pain, because we don’t avoid its cause. Basically, it might mean that we might turn *away* from those lessons of the two hedonic masters Bentham thought we invariably, always, respect – pain and pleasure – in order to accommodate the world that displeases us, by casting the self so pained or displeased aside.

If we do that over a long enough period of time – maybe an entire adulthood – if we consistently consent to that which displeases or pains us – then I think it’s fair to say that the result might be “consensual dysphoria”: dysphoria, because like all forms of dysphoria, it is an intense unease in one’s own body, and “consensual,” because the root of the experience is the disconnect between the act of consent and the presumed increase in wellbeing it brings, according to the economized theory of value, and the displeasure or pain felt by one’s hedonic self by virtue of what that consenting self is up to. The economic self consents to transactions, trades, and bargains, satiating preferences along the way. The hedonic self feels no increase in wellbeing when the economic self does so. Yet the former is supposed to bring about the latter. But it doesn’t. So, the hedonic self is minimized, or cabined, or numbed, or erased. The point I want to insist on is that this phenomenon, if it exists, is *not* false consciousness, sour grapes, or “exogenous preferences.” Those too are real phenomena, found in the gap between the economic self and the ideal self, the gap between our choices, and what does or doesn’t further one’s own interests. It is the gap, in other words, between the satiation of preference, which creates economic value by definition, and the furtherance of interest, which might or might not be occasioned by preference-based decisions. By “consensual dysphoria”, I mean to refer to the subjective experience of a different gap – not between preference and objective *interest*, however defined, but rather, between preference and *pleasure*, between the economic and the *hedonic* self. Where there is a gap, if it is experienced as such, the result might be dysphoria. If it is experienced routinely, across the course of a lifetime, the hedonic self might just die.

Perhaps *Bartleby*, as depicted by Melville, suffers from consensual dysphoria, and perhaps that accounts for the ability of some of us, including a number of OWS protestors, to empathize with him. We can all recognize, readily, the gap between *Bartleby*’s preferring self and his ideal self. *Bartleby* prefers not to work, find his own home, avoid jail, have intimacy in his life, or eventually, to eat. Yet, his ideal self – his real interests, the good he ought to be pursuing – we all – narrator, reader, passersby – know – would be furthered with work, with pay, with a home of his own, and with nutrition: all of which he is offered, and all of which he prefers not to accept. His revealed preferences then are not tracking his actual interests. But there is another gap the reader and the narrator might see in *Bartleby*, that is more disturbing. *Bartleby*’s preferences are at a radical disjuncture with his hedonic pleasures and pains, with his felt, sensate experiences of those choices, and with his biologic being in the world. His translucence, his pallid appearance, his cadaverous utterances, his forlornness, and his behavior – the staring out the window at a blank wall, standing motionless, his refusal of money and food, his refusal to move – all point us to a person who has numbed himself to animalistic and mammalistic experiences of pleasure and pain. He doesn’t seem to be registering either, and the more his preferences are satiated, the worse the numbness becomes. His biologic being, of course, eventually is killed by this – by his own lethal preferences. His hedonic being dies alongside.

Conclusion

By 2011, there was no shortage of anti-Wall Street fiction, from which the OWSers could have drawn moral support, and from which they could have picked a mascot. Just from the prior thirty years, they could have embraced, as a guiding or informative text, Tom Wolfe's *Bonfire of the Vanities*, a near-canonical modernist depiction of a morally compromised Wall Street bond salesman, *American Psycho*, the graphic account of a psychopathic and misogynistic Wall Street stockbroker who merges making a killing on Wall Street with making killings, period, *Wall Street*, the near-classic film depiction of capitalist greed and crime that came to define the go-go eighties, or *Boiler Room* from the 1990s and *The Wolf of Wall Street* from the 2000 teens, both of which depicted the criminal activities of the same penny stock scammer. Yet it was Melville's mid-19th century novella, depicting an enigmatic, profoundly opaque and sickly scrivener, as told by his by-no-means-criminal and by-no-means particularly selfish or greedy wall street lawyer-employer – a man who by the end of the story has offered his scrivener his own charity, money and home in his attempt to save his life – that grabbed their attention. It's worth wondering why. One possibility is that the OWSers themselves, by this choice, seemed to be suggesting that it's not greedy or criminal or psychotic or even cynical or morally compromised Wall Street brokers or lawyers that we need to watch out for. It is, rather, what we value and how. And, one of the costs – not the only cost, but one of the costs – of what we value, and how, may be our own alienation from our hedonic selves: the selves that experience the world not as one which we make and remake through our autonomous choices, but rather, as pleasing or painful, as soothing or cutting, as nurturing and comforting or threatening and hurtful, as sustaining or draining. As we discredit our hedonic selves as a measure of what we value and why, in preference for our choosing selves, we may be honoring our autonomy while killing the animal within. The result may be a freer self who, like *Bartleby*, is cadaverous, melancholic, pallid and forlorn. And dead.

Why did we miss this, if this is, at least in part, the lesson we might learn from Melville's *Story of Wall Street*? I think there are two – fully sufficient – reasons, although I'm sure there are others as well. First, sustained critique of the disjuncture between economic and hedonic conceptions of value that the story plausibly depicts is missing in the academic literature, including the literature most pointedly critical of that economic conception itself. In law, the focus of the critics of the economic conception of value has been, instead, on the transformation of American *law* reflected and in part fueled by that conception – the critique of formalism, classical legal thought, and liberal legalism. In moral and political philosophy, and some legal philosophy as well, particularly from the critical legal studies movement of the 1980s, critics of the economic conception of value have focused on the disjuncture between that conception and various objective accounts of the good, whether those accounts be Millian or Aristotlean or Marxian, and whether "interest" based, capabilities based, or something more naturalistic. Both strands of critique are well reflected in the critical responses to *Bartleby*: thus, legally sophisticated critics such as Thomas have noted, and commented upon, the legitimating effect of legal formalism on the diminution of conscience of powerful elites, and the diminution of the public sphere, and its subordination to markets, and seen all of that well-recorded in Melville's story, while moral and political

philosophers, including, in different ways, Bartlett, Agamben, Poore and Zizek all, have seen in *Bartleby* echoes of the radical disjunction between economics conceptions of value and some objective ideal account of the good. The abandonment of *hedonic* rather than ideal accounts of the good for consent and preference based accounts – the gap, in other words, between economic accounts of value and Benthamite accounts, rather than, between economic accounts of value and Millian accounts – has not generated nearly as great a critical literature, and it is just that absence that is in turn reflected in the gaps in the critical reception of *Bartleby*.

Second, the contours, the profundity and even the logic of that displacement – much less the dysphoria it might occasion – didn't set in in any sort of clear way until several decades into the twentieth century, or three quarters of a century after Melville's story. Melville's story, in other words, was not *just* a narrative and fictive accounting of the transformation of American law and value, then under way. It was also *prescient*. More specifically, it was a prescient narrative indictment of the economization of conceptions of value that underlaid that transformation, the contours of which, however, would only become clear well after the time of the story, and of Melville's writing of it. More specifically still, it was a prescient depiction of the political-psychological maladies that would eventually accompany it. Melville nailed *that* in his story, in addition to much else. He depicted – but also predicted – the maladies such a transformation in value would bring on, as manifested in the pathos of his famous scrivener. Melville's prescient account of consensual dysphoria, in short, is what is missing in the voluminous protest literature that this story of Wall Street has inspired. It may also be what the Wall Street protestors found so compelling – and so sadly familiar – in Melville's most forlorn character.

NOTES

¹ HERMAN MELVILLE, *Bartleby The Scrivener: A Story of Wall Street*, in BARTLEBY THE SCRIVENER, BENITO CERNO, BILLY BUDD (Quality Paperback Book Club ed. 1996) (1853) (*hereinafter* “Bartleby”).

² See Roberta Bienvenu, *Bartleby the Scrivener*, 62 SHENANDOAH LIT. 2, <http://shenandoahliterary.org/622/bartleby-the-scrivener-occupies-wall-street/> Regina Dilgen, *The Original Occupy Wall Street: Melville’s “Bartleby, the Scrivener,”* 93 RADICAL TEACHER 54-55 (2012); Hannah Gersen, *Bartleby’s Occupation of Wall Street*, THE MILLIONS (Oct. 11, 2011), <http://www.themillions.com/2011/10/bartleby%E2%80%99s-occupation-of-wall-street.html>; Jonathan D. Greenberg, *Occupy Wall Street’s Debt to Melville*, THE ATLANTIC (Apr. 30, 2012), <http://www.theatlantic.com/politics/archive/2012/04/occupy-wall-streets-debt-to-melville/256482/>; Nina Martyris, *A Patron Saint for Occupy Wall Street*, NEW REPUBLIC (Oct. 15, 2011), <https://newrepublic.com/article/96276/nina-martyris-ows-and-bartleby-the-scrivener>.

³ *Bartleby* at 14.

⁴ *Id.* at 15.

⁵ *Id.* at 15.

⁶ *Id.* at 21.

⁷ *Id.* at 30.

⁸ *Id.* at 43. (“He refuses to do any copying; he refuses to do any thing; he says he prefers not to; and he refuses to quit the premises.”).

⁹ *Id.* at 50. (“Strangely huddled at the base of the wall, his knees drawn up, and lying on his side, his head touching the cold stones, I saw the wasted Bartleby. But nothing stirred.”).

¹⁰ HERMAN MELVILLE, *THE PARADISE OF BACHELORS AND THE TARTARUS OF MAIDS* (1855)

¹¹ *Bartleby* at 31.

¹² *Id.* at 46.

¹³ *Id.* at 48-49.

¹⁴ *Id.* at 9. (“Nippers, like his compatriot Turkey, was a very useful man to me; wrote a neat, swift hand....”).

¹⁵ See e.g., *Id.* at 13, 15, 21, 25, 26, 41, 47, 49 for references to Bartleby being “pale” or “pallid.”

¹⁶ *Id.* at 31 (“...his stay with me might have temporarily impaired his vision”), 9 (“never eats a dinner, properly speaking.”)

¹⁷ *Id.* at 27. (“My first emotions had been those of pure melancholy and sincerest pity.”).

¹⁸ *Id.* (“To a sensitive being, pity is not seldom pain. And at last it is perceived that such pity cannot lead to effectual succor, common sense bids the soul rid of it.”).

¹⁹ Brook Thomas, ‘*Bartleby, the Scrivener*’; *Fellow Servants and Free Agents On Wall Street*, CROSS EXAMINATIONS OF L. & LIT. 164-69 (1987).

²⁰ *Bartleby* at 51.

²¹ See Louise K. Barnett, *Bartleby As Alienated Worker*, 11 STUD. IN SHORT FICTION 379 (1974); see also Naomi Reed, *The Specter of Wall Street: Bartleby, the Scrivener, and the Language of Commodities*, 76 AM. LIT. 247-73 (2004).

²² Alternatively, as a number of Marxist critics following her argued, the struggles in the lawyer’s office may well have been a fully intended representative snapshot of the labor struggles that were overtaking New York City in the 1840s and 50s, the time of the writing of the novel, its setting, and its reception all. See Naomi Reed, *The Specter of Wall Street: Bartleby, the Scrivener, and the Language of Commodities*, 76 AM. LIT. 247-73 (2004) for a complete discussion, and a compelling account of spectrality in both Marx’s depiction of the relation of commodities to value, and in Melville’s rendering of Bartleby, and David Keubrich, *Melville’s Doctrine of Assumptions: The Hidden Ideology of Capitalist Production in Bartleby*, 69 NEW ENGLAND QUARTERLY 381 (1996). For other Marxist or Marxist informed readings, see Patricia Barber, *What if Bartleby Were a Woman*, in THE AUTHORITY OF EXPERIENCE: ESSAYS IN FEMINIST CRITICISM 212 (Arlyn Diamond & Lee R. Edwards eds., 1977); Barbara Foley, *From Wall Street to Astor Place: Historicizing Melville’s ‘Bartleby,’* 72 AM. LIT. 87-116 (2000); Robin West, *Invisible Victims: A Comparison of Susan Glaspell’s Jury of Her Peers and Melville’s Bartleby the Scrivener*, 8 CARDOZO STUD. L. & LIT. 203 (1996); Michael Zeitlin, *Bartleby is Dead*, 24 CAN. REV. AM. STUD. 113 (1994).

²³ Thomas, *supra* note 19, at 165.

²⁴ MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1977).

²⁵ Thomas, *supra* note 19, at 174.

- ²⁶ GIORGIO AGAMBEN, *HOMER SACER* 48 (2004).
- ²⁷ GIORGIO AGAMBEN, *POTENTIALITIES* 243-271 (1999).
- ²⁸ MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 203-4 (2000).
- ²⁹ See SLAVOJ ZIZEK, *THE PARALLAX VIEW* 381-82 (2004); Interview by Jonathan Derbyshire with Slavoj Zizek, *NewStatesman* (Oct. 29, 2009), <http://www.newstatesman.com/ideas/2009/10/today-interview-capitalism>.
- ³⁰ Jonathan Poore, *Bartleby's Occupation: "Passive Resistance" Then and Now*, NONSITE.ORG (May 1, 2013).
- ³¹ See, e.g., Jonathan Poore, *Bartleby's Occupation: "Passive Resistance" Then and Now*, NONSITE.ORG (May 1, 2013); Brook Thomas, 'Bartleby, the Scrivener'; *Fellow Servants and Free Agents On Wall Street*, *CROSS EXAMINATIONS OF L. & LIT.* 165 (1987); SLAVOJ ZIZEK, *THE PARALLAX VIEW* 342 (2004);
- ³² GIORGIO AGAMBEN, *HOMER SACER* 33 (2004).
- ³³ Louise K. Barnett, *Bartleby As Alienated Worker*, 11 *STUD. IN SHORT FICTION* 379 (1974).
- ³⁴ Brook Thomas, 'Bartleby, the Scrivener'; *Fellow Servants and Free Agents On Wall Street*, *CROSS EXAMINATIONS OF L. & LIT.* 173-74 (1987).
- ³⁵ Amy Ronner summarizes the psychological readers in her insightful piece on Bartleby and Therapeutic Jurisprudence. Amy Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 *TOURO L. REV.* 624-25 (2008). See, e.g., Nancy Blake, *Mourning and Melancholia in Bartleby*, 7 *DELTA* 155, (1978)(Bartleby as autistic); Morris Beja, *Bartleby and Schizophrenia*, 19 *MASS REV.* 555 (1978)(Bartleby as schizophrenic and catatonic); Ted Billy, *Eros and Thanatos in Bartleby*, 31 *ARIZ. Q.* 21 (1975) (Bartleby as fragmented, anxious and alienated).
- ³⁶ See e.g., Maggie MacLure, Rachel Holmes, Liz Jones and Christina MacRae, *Silence as resistance to analysis*, Paper presented to the Annual Meeting of the Am. Educ. Research Ass'n (2007), available at <http://www.esri.mmu.ac.uk/respapers/papers-pdf/silence.pdf>
- ³⁷ For a good summary of interpretations that see Bartleby's misery as a reflection of Melville's own frustrations, see Ronner, *supra* note 36, at 615-19.
- ³⁸ Thomas, *supra* note 19, at 170.
- ³⁹ MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1977).
- ⁴⁰ Bartleby at 4-5, as commented upon in Thomas, *supra* note 19, at 165.
- ⁴¹ For a philosophical treatment of the law of the unconscionability doctrine and its relation to contract law see Seana Valentine Shffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *PHIL. & PUB. AFF.* 205-06 (2000). For a discussion of the roots of the doctrine in the equity courts, see Paul M. Morley, *Commercial Decency and the Code - The Doctrine of Unconscionability Vindicated*, 9 *WM. & MARY L. REV.* 1143 (1968).
- ⁴² See Shffrin, *supra* note 41, at 206.
- ⁴³ Thomas, *supra* note 19, at 169-70.
- ⁴⁴ Bartleby at 38 ("...charity often operates as a vastly wise and prudent principle")
- ⁴⁵ *Id.* at 19 ("To befriend Bartleby; to humor him in his strange willfulness, will cost me little or nothing, while I lay up in my soul what will eventually prove a sweet morsel for my conscience.")
- ⁴⁶ *Id.* at 38 ("Men have committed murder for jealousy's sake, and anger's sake, and hatred's sake, and selfishness' sake, and spiritual pride's sake; but no man that ever I heard of, ever committed a diabolical murder for sweet charity's sake.")
- ⁴⁷ Thomas, *supra* note 19 at 169. ("Always practical, the lawyers views charity as a happy meeting place of allegiance to higher values and self-interest.")
- ⁴⁸ *Id.* at 25. ("For both I and Bartleby were sons of Adam.")
- ⁴⁹ Thomas *supra* note 19 at 171.
- ⁵⁰ Thomas, *supra* note 19, at 171; Horwitz, *supra* note 39 at 204.
- ⁵¹ See UCC §2-302; *Unconscionable Contracts Under the Uniform Commercial Code*, 109 *U. PA. L. REV.* 401 (1961).
- ⁵² See e.g., Bartleby at 13, ("I came within an ace of dismissing him then"), 16, ("doubtless I should have violently dismissed him from the premises").
- ⁵³ On the evolution of the doctrine of consideration along these lines, see Lon L. Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799 (1941); Lon L. Fuller & William R. Perdue, *The Reliance Interest in*

Contract Damages, 46 YALE L. J. 52-96 (1936); Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986).

⁵⁴ Bartleby at 41.

⁵⁵ See Thomas, *supra* note 19, at 165- 69; see also Robert Cover's discussion of Billy Budd and its relation to Shaw, in ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1984).

⁵⁶ Robin West, *The Other Utilitarians*, in ANALYZING LAW 197 (Brian Bix ed., 1998).

⁵⁷ JOHN STUART MILL, UTILITARIANISM 8-11 (1863).

⁵⁸ For a classic treatment and defense of wealth utilitarianism, and an argument for its superiority over benthamic hedonic utilitarianism, see chapters on value, utilitarianism and efficiency in RICHARD A. POSNER, *ECONOMICS OF JUSTICE* (1981).

⁵⁹ *Id.* at 49.

⁶⁰ *Id.* at 89. For a good discussion and critical analysis, see Kelman, *Choice and Utility*, 1979 WISCONSIN LAW REVIEW 769 (1979). See also Robin West, *The Other Utilitarians*, in ANALYZING LAW 197 (Brian Bix ed., 1998).

⁶¹ See Posner, *supra* note 58, at 89, See generally ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (2003). For a critical analysis, see Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

⁶² Posner, *supra* note 60.

⁶³ See, e.g., Richard Epstein, *Regulatory Paternalism in the Market for Drugs: Lessons from Vioxx and Celebrex*, 5 YALE J. OF HEALTH, POL'Y, L. & ETHICS, <http://digitalcommons.law.yale.edu/yjhple/vol5/iss2/6>; Richard Posner, *The Regulation of the Market in Adoptions*, 67 BOSTON UNIV. L. REV. 59 (1987); Elizabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 THE J. OF LEGAL STUD. 323-48 (1978).

⁶⁴ RICHARD POSNER, *SEX AND REASON* (1994) (for arguments legalizing all consensual sex); Elizabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 THE J. OF LEGAL STUD. 323-48 (1978) (arguments for legalizing markets in adoption).

⁶⁵ The clearest manifestation of this is the importance of the Coase theorem, which basically reaches its conclusions by assuming a contractual default approach to nuisance, tort, and administrative law. See R. H. Coase, *The Problem of Social Cost*, 3 THE J. OF L. & ECON. (1960).

⁶⁶ Bartleby at 37.

⁶⁷ *Id.* at 48 ("I know you," he said, without looking round, - "and I want nothing to say to you.").

⁶⁸ *Id.* at 45 ("It does not strike me that there is any thing definite about that. I like to be stationary.").

⁶⁹ *Id.* at 44 ("There is too much confinement about that. No I would not like a clerkship; but I am not particular.").

⁷⁰ For a short sample, see Martha Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (1997); AMARTYA SEN & BERNARD WILLIAMS, *EDS., UTILITARIANISM AND BEYOND* (1982); JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 9, 12, 32 (1983); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (1979).

⁷¹ JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 41 (1983); AESOP FABLES, *THE FOX AND THE GRAPES* (6th Century B.C.).